

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 28th day of June, two thousand ten.

PRESENT:

JON O. NEWMAN,
JOSÉ A. CABRANES,
DEBRA ANN LIVINGSTON,
Circuit Judges.

ZHONG MIN CHEN,
Petitioner,

v.

09-0917-ag
NAC

ERIC H. HOLDER, Jr., U.S. ATTORNEY
GENERAL,
Respondent.

FOR PETITIONER: Oleh R. Tustaniwsky, New York, New York.

FOR RESPONDENT: Tony West, Assistant Attorney General, Greg D. Mack, Senior Litigation Counsel, Micheline Hershey, Attorney, Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C.

1 UPON DUE CONSIDERATION of this petition for review of a
2 decision of the Board of Immigration Appeals ("BIA"), it is
3 hereby ORDERED, ADJUDGED, AND DECREED, that the petition for
4 review is GRANTED.

5 Petitioner Zhong Min Chen, a native and citizen of the
6 People's Republic of China, seeks review of a February 10,
7 2009, order of the BIA, affirming the January 31, 2007,
8 decision of Immigration Judge ("IJ") Sandy K. Hom, denying
9 his application for asylum, withholding of removal, and
10 relief under the Convention Against Torture ("CAT"). *In re*
11 *Chen*, No. A099 535 490 (B.I.A. Feb. 10, 2009), *aff'g* No.
12 A099 535 490 (Immig. Ct. N.Y. City Jan. 31, 2007). We
13 assume the parties' familiarity with the underlying facts
14 and procedural history of the case.

15 Under the circumstances of this case, we review the
16 decision of the IJ as supplemented by the BIA. See *Yan Chen*
17 *v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005). The
18 applicable standards of review are well-established. See
19 8 U.S.C. § 1252(b)(4)(B); *Yanqin Weng v. Holder*, 562 F.3d
20 510, 513 (2d Cir. 2009).

21 Chen alleged past persecution in the People's Republic
22 of China based on his Christian house church activities in

1 August 2004 and his distribution of religious flyers at a
2 public park in October 2005. He testified that, in the 2004
3 episode, police raided the home church and arrested him
4 after those attending the service with him escaped. He
5 testified that he was beaten, punched, kicked, hit on his
6 back and face, and struck on his head with a chair, a blow
7 that has left a visible scar. He also testified that he was
8 detained for two days without food or water and not allowed
9 to sleep. He went to a doctor and received medicines for his
10 injuries. In the 2005 episode, police interrupted his public
11 distribution of flyers by attempting to arrest him. They
12 choked him by grabbing his throat. He managed to escape by
13 biting the hand of the police officer. He never returned
14 home; his father told him that police had come to the home
15 to arrest him.

16 Chen also testified that he regularly attends the
17 Church of Grace in New York City, and produced a letter,
18 signed by the Pastor and Minister of the Church, certifying
19 that, according to the Church's registration book, Chen has
20 been attending Sunday Service regularly since September 10,
21 2006.

22 The IJ found that Chen was not credible. This finding

1 was stated to be "primarily due to [Chen's] demeanor as
2 witnessed by the court and [Chen's] inability to evoke a
3 timbre of truth in his voice during his testimony."

4 Although demeanor is relevant to an assessment of
5 credibility, the reliance on the lack of a "timbre of truth"
6 in Chen's voice, is too vague to provide support for an
7 adverse credibility finding. Another flaw in the IJ's
8 finding arises from the IJ's faulting Chen because he was
9 both "hesitant" and "quick" in his responses. A further flaw
10 is the IJ's disbelief of Chen because Chen produced a
11 Notarial Birth Certificate, issued in 2006, something the IJ
12 thought was unlikely to have been issued if Chen was being
13 sought as a fugitive. However, this basis for disbelief is
14 speculation in the absence of any indication that the agency
15 issuing the birth certificate would be aware of local police
16 interest in Chen. The IJ declined to give the letter from
17 Church officials "any evidentiary weight" because it was
18 considered "a form like fill-in-the-blanks letter." The fact
19 that leaders of an organization use a form letter, with
20 names and dates filled in on appropriate lines in the
21 letter, to respond to frequent requests for information is
22 not a reasonable basis to disregard entirely the weight of

1 such a document. Because the IJ's findings were flawed, the
2 IJ could not properly base his adverse credibility
3 determination on the lack of corroborating evidence alone.
4 *See Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000).

5 The decision of the BIA is also flawed in that it
6 asserts that the IJ "reasonably relied on inconsistencies"
7 although no inconsistency is identified, and none appears in
8 the IJ's opinion.

9 It is unclear whether the IJ would have made an adverse
10 credibility finding if the flaws we have identified were
11 eliminated and whether the BIA would have upheld even the
12 IJ's flawed credibility determination had it not erroneously
13 believed that the IJ relied on inconsistencies in the
14 record. *See Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d
15 315, 339 (2d Cir. 2006); *Cao He Lin v. U.S. Dep't of*
16 *Justice*, 428 F.3d 391, 406 (2d Cir. 2005).

17 Because this Court cannot confidently predict that the
18 agency would reach the same conclusion absent the BIA's
19 mischaracterization of the record and the flaws in the IJ's
20 adverse credibility determination, we find that remand is
21 required. *See Xiao Ji Chen*, 471 F.3d at 339.

22 For the foregoing reasons, the petition for review is

1 GRANTED, the BIA's order is VACATED, and the case REMANDED
2 for further proceedings consistent with this Order. As we
3 have completed our review, any stay of removal that the
4 Court previously granted in this petition is VACATED, and
5 any pending motion for a stay of removal in this petition is
6 DISMISSED as moot. Any pending request for oral argument in
7 this petition is DENIED in accordance with Federal Rule of
8 Appellate Procedure 34(a)(2), and Second Circuit Local Rule
9 34.1(b).

10 FOR THE COURT:
11 Catherine O'Hagan Wolfe, Clerk
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